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CRIMINAL LAW ISSUES

INDIANA DEP'T OF REVENUE v. ADAMS, No. 49S10-0011-TA-628, ___ N.E.2d ___ (Ind. Feb. 8, 2002).

SULLIVAN, J.

This is the first of two cases we decide today involving Dante Adams's difficulties with state revenue and criminal authorities after cocaine was discovered first in his safe deposit box and later in his home. This case presents the question of whether the cocaine found in an unconstitutional search of the safe deposit box by criminal authorities can be used by revenue authorities to make a tax assessment. We conclude that although the exclusionary rule bars the use of the cocaine as evidence in criminal proceedings, the exclusionary rule does not apply to tax assessment proceedings.

. . . .

We acknowledge some deterrence of revenue officers if the exclusionary rule is applied to CSET proceedings but we think these circumstances will be infrequent. In the companion case, we hold that CSET levies will generally be reasonable for Fourth Amendment purposes. Adams v. State, slip op. at 12. The companion case invalidates searches by revenue officers only where the officers rely solely on a jeopardy warrant issued under Indiana Code § 6-7-3-13's provisions that allow the Department to issue jeopardy warrants without any standards or showing of exigency. Id. However, most jeopardy warrants are not issued under that code section. Instead, they are issued under Ind. Code §6-8.1-5-3. Id. As such, the Department will be able to issue jeopardy warrants and levy on CSET assessments in most circumstances without violating the Fourth Amendment. Because levies by the Department will only violate the Fourth Amendment in certain narrow circumstances, application of the rule will not produce any significant deterrence to unlawful conduct by revenue officers.

. . . .

SHEPARD, C. J. and RUCKER, J., concurred.

BOEHM, J., filed a separate written opinion in which he dissented and in which DICKSON, J., joined, in part, as follows:

I respectfully dissent. . . . Here the seizing agency was the county sheriff's department and the civil proceeding was an assessment of a tax that is essentially punitive and whose collection augments local law enforcement funding. Under these circumstances, I believe both precedent and principle dictate that the Fourth Amendment precludes admission of the evidence in this case.

. . . .

ADAMS v. STATE, No. 49S04-0011-CR-627, ___ N.E.2d ___ (Ind. Feb. 8, 2002).
SULLIVAN, J.

Police officers found cocaine in a safe deposit box that Adams leased from an Indianapolis bank, but a trial court later determined that the search violated Adams's constitutional rights and suppressed the cocaine for purposes of pending criminal charges against him. [Footnote omitted.]

On March 23 – a day before the criminal charges were dropped – the Indiana Department of Revenue ("the Department") issued an assessment pursuant to the Controlled Substance Excise Tax ("CSET") [footnote omitted] against Defendant. The assessment included $79,548 in unpaid tax and a 100 percent penalty, yielding a total assessment of $159,096. The drugs seized from Defendant's safe deposit box were the basis for the tax. Upon learning of the assessment, Defendant filed a protest letter with the Department.

On March 31, 1998, the Department issued a tax warrant to collect on the CSET assessment. Pursuant to the warrant, revenue officers entered Defendant's home on April 13. While looking for assets to satisfy the assessment, the officers discovered cocaine hidden in a stove and in a bedroom drawer. Marion County narcotics detectives waited outside the home while the revenue officers searched it. When the Department's officers found the cocaine, the narcotics officers entered. Even though the narcotics officers decided to seek a search warrant, the search of the home continued unabated. In fact, the officers found more cocaine before a search warrant was obtained. [Footnote omitted.]

. . . .

Under section 3 of the General Enforcement Chapter, the CSET's status as a "jeopardy assessment" allows the Department to expedite collection, including the power to issue "jeopardy tax warrants" against the taxpayer. Ind. Code §6-8.1-5-3. These warrants empower revenue officers to "levy on and sell the [taxpayer's] property" and to do so "either without or with the assistance of the sheriffs of any counties in the state." [Citation omitted.] [Footnote omitted.] Jeopardy tax warrants are issued by the Department unilaterally without judicial review but typically can be issued only when the Department concludes that the taxpayer intends to take some action that would jeopardize the state's ability to collect the tax. See id. However, the CSET Chapter provides that "[a]n assessment for the tax due under [the CSET] is considered a jeopardy assessment. The Department shall demand immediate payment and take action to collect the tax due as provided by Ind. Code §6-8.1-5-3." Ind. Code §6-7-3-13. As such, the CSET Chapter provides that assessments under the CSET are jeopardy assessments per se, Ind. Code § 6-7-3-13, allowing the Department to skip the finding of exigency required by section 3 of the General Enforcement Chapter, Ind. Code § 6-8.1-5-3.

Under these statutes, then, jeopardy tax warrants under the CSET are not issued pursuant to judicial review and are not necessarily based on probable cause since there is no required finding of exigency. An entry of a home pursuant to these warrants is therefore presumptively unreasonable and the search of Defendant's home was unconstitutional unless some exception to the warrant rule applies.

. . . [W]e must determine whether the nature of the CSET makes an entry into a home to collect the tax reasonable even if the revenue officers obtained only a non-judicial jeopardy tax warrant.

. . . .

We therefore conclude that both of the factors that led the G.M. Leasing [v. United States, 429 U.S. 338 (1977)] Court to conclude that a search of a home under 26 U.S.C. § 6331 was unreasonable are present in searches of homes conducted pursuant to jeopardy tax warrants issued to collect Indiana CSET assessments. First, in both instances officers

have boundless discretion to intrude upon the privacy of the home. Because section 13 of the CSET Chapter states that all CSET assessments are jeopardy assessments, Ind. Code § 6-7-3-13, the only limit placed on revenue officers' ability to search homes is the requirement that they fill out their own warrant. [Citation omitted.] Second, G.M. Leasing determined that the exigency of the circumstances did not justify a warrantless entry into the cottage. The search of Defendant's home was based on even less exigency. In G.M. Leasing, the taxpayer whose conduct initiated the seizures was a fugitive. The IRS knew that his family members were attempting to hide assets and were alone with documents inside the cottage. There is nothing in the present record to suggest that Defendant was about to abscond, hide assets, or destroy documents. . . .

. . . .

We therefore hold that the trial court should have suppressed evidence stemming from the search of Defendant's home under the jeopardy tax warrant. [Footnote omitted.]

. . . .

Our holding that the search of Defendant's home was unreasonable is a limited one. In this case, government officers intruded upon the privacy of a home. Our conclusion that this intrusion was unreasonable does not affect the Department's ability to seize assets found in less private contexts. In fact, G.M. Leasing endorsed the government's power to institute tax liens, seize assets found in public places, and take other basic measures to collect taxes so long as they do not involve warrantless intrusions into the home. [Footnote omitted.] Moreover, our holding does not affect the Department's ability to collect taxes under the General Enforcement Chapter using jeopardy assessments and jeopardy warrants in most circumstances. The jeopardy warrant procedures both cabin revenue officers' discretion and provide that such warrants will not be issued except in exigent circumstances. We conclude today that execution of jeopardy warrants based only on a statutory declaration in the CSET Chapter that the CSET is a jeopardy assessment is unreasonable. This conclusion does not impinge on the general functioning of jeopardy warrants based on a finding of exigency.

. . . .

SHEPARD, C. J., and BOEHM, DICKSON, and RUCKER, JJ., concurred.

SWAYNIE v. STATE, No. 79S02-0104-CR-194, ___ N.E.2d ___ (Ind. Feb. 8, 2002).

SULLIVAN, J.

In this case, the jury was instructed that in order to convict Defendant of burglary the State was required to prove beyond a reasonable doubt that Defendant (1) knowingly or intentionally, (2) broke into and entered, (3) the victims' home, (4) with the intent to commit a felony, to wit, murder the woman's husband. The Court of Appeals concluded that Defendant's double jeopardy rights were violated because there was a reasonable possibility that the evidence that Defendant strangled the husband was used by the jury to establish both the essential elements of the attempted murder charge and the intent-to-commit-murder element of the burglary charge.

We hold that there is no Indiana double jeopardy violation in these circumstances. The criminal transgression addressed by the proscription on burglary is the breaking into and entering of a building or structure of another person with the intent to commit a felony. Thus, the criminal transgression of burglary is committed by a person intending to commit an underlying felony at the moment the building or structure is broken into and entered. The person's culpability is established at the point of entry regardless of whether the underlying intended felony is ever completed. Indeed, a person who breaks and enters without any i ntent to commit an underlying felony is not guilty of burglary. Because burglary and the underlying intended felony (if committed) are separate criminal transgressions, Richardson [v. State, 717 N.E.2d 32 (Ind. 1999)] does not prohibit conviction and sentencing for both.

. . . .
SHEPARD, C. J., and BOEHM and RUCKER, JJ., concurred.
DICKSON, J., did no participate.

GOBLE v. STATE, No. 92A03-0103-CR-95, ___ N.E.2d ___ (Ind. Ct. App. Feb. 8, 2002).
SULLIVAN, J.

In 1998, Whitley County Consolidated Schools hired Schrader Real Estate & Auction ("Schrader"), a licensed realtor auctioneer, to take bids for the sale of Thorncreek Elementary School, for which the school corporation no longer had any use. Schrader received seven bids for the property, including a $20 gold piece from Goble, which he submitted on behalf of the Body of Christ Church. On November 16, 1999, the school board accepted a bid of $63,400 from the Wabash Book Company of Fort Wayne. Earlier that day, Goble filed a "Common Law Lien – Pursuant to Indiana Code 32-8-39-1" with the Whitley County Recorder. Under oath, Goble signed the document as "Beloved," in his capacity as pastor and trustee for Body of Christ Unlimited. [Citation to Brief omitted.] As the legal basis upon which Goble asserted his right to hold the common law lien, Goble stated that he had "purchased" the property "with 'Best Offer' and 'best bid' by payment in full . . . of a Twenty Dollar Liberty Gold Coin . . . contained in the sealed bid delivered by [Goble] pursuant to the advertised auction Notice" and that "agents of Whitley County Consolidated Schools Corporation caused to be stolen on or about the morning of November 12, 1999, . . . all said Property . . . ." [Citation to Brief omitted.] Based on this statement, the State filed an information on February 15, 2000, . . . charging Goble with perjury and filing a fraudulent record.

In 1999, Whitley Superior Court Judge Michael Rush presided over an unrelated case involving Goble. For undisclosed reasons, Judge Rush subsequently recused himself from Goble's case. On December 17, 1999, after Judge Rush had recused himself, an order to appear at a hearing scheduled for January was sent to Goble with Judge Rush's signature stamp affixed to it. As a result of this order, Goble filed with the Whitley County Recorder a common law lien against Judge Rush's house. Goble signed the document under oath as "Michael Lynn., goble." [Citation to Brief omitted.] As the legal basis for the lien, Goble stated in the body of the document:

> "This Claim is made in good faith for the reason that Michael Lynn., goble believes that facts are that on December 22, 1999, Michael D. Rush issued an invalid Order by Trespass on the case in CAUSE NO. 92D01-9507-DF-389 by judge . . . FRAUD upon the Court inasmuch as an ORDER TO APPEAR, January 4, 2000 at 8:30 is as a matter of Record without authority of a "Qualified" Judge and by a judge . . . acting in administrative, or ministerial capacity as a common outlaw in place of the special judge appointed by the Indiana Supreme Court due to the fact also that the commission of Michael D. Rush was and still is withdrawn from said CAUSE. That these facts constitute a Trespass of Tort against the Civil Liberties of Michael Lynn., goble. Wherefore, in such capacity, Michael D. Rush has no immunity from prosecution by Michael Lynn. . . ." [Citation to Brief omitted.]

This statement served as the basis for the [second] information filed by the State on February 18, 2000, . . . charging Goble with perjury and filing a fraudulent record.

. . . .

Goble argues that he was denied his constitutional right to counsel when the trial court refused his mid-trial request to have his standby counsel conduct the direct examination of him, argue his motion for judgment on the evidence, and present the closing argument. . . .

In the present case, at a preliminary hearing on February 21, 2000, the trial court appointed J. Brad Voelz, a public defender, to represent Goble at trial. At a pre-trial

conference on March 20, 2000, Mr. Voelz informed the trial court that Goble wanted to represent himself. Goble clarified for the court that he wanted Mr. Voelz to serve as standby counsel, to assist him with his investigation and in understanding the law. [Footnote omitted.] The trial court then appointed Mr. Voelz as standby counsel and directed Goble to advise the court prior to trial as to whether he or Mr. Voelz would conduct the jury trial. [Footnote omitted.] Goble filed all motions on his behalf, conducted twenty to thirty depositions, and represented himself, with Mr. Voelz present as standby counsel, at all hearings prior to the jury trial and at the jury trial.

At trial, Goble presented an opening statement, cross-examined the State's three witnesses, and conducted direct examination of his witnesses. At the end of the lunch break on the second day of trial, Goble informed the trial court that he was the last witness to testify and requested that Mr. Voelz be permitted to take over his case because of the difficulty inherent in questioning himself. The State objected, and the trial court subsequently denied Goble's request. . . .

It is within the trial court's discretion to determine whether a defendant may abandon his pro se defense after trial has begun and reassert his right to counsel. Koehler, [v. State] 499 N.E.2d [196] at 198-99 [Ind. 1986]. . . . In Koehler, our Supreme Court identified five factors to be considered. . . . [Footnote omitted.] [T]he trial court should consider: (1) the defendant's prior history in the substitution of counsel and in the desire to change from self-representation to counsel-representation, (2) the reasons set forth in defendant's request, (3) the length and stage of the trial proceedings, (4) any disruption or delay in the trial proceedings which might be expected to ensue if the request is granted, and (5) the likelihood of defendant's effectiveness in defending against the charges if required to continue to act as his own attorney. [Citation omitted.] . . .

. . . The trial court clearly considered the length and stage of the proceedings, recognizing that the trial was almost complete when Goble requested that Mr. Voelz be permitted to take over. [Footnote omitted.] Further, in its statement, the trial court seemed to indicate that under the circumstances, Goble had done rather well representing himself. The trial court acknowledged that Goble had prepared his case, questioned witnesses, and posed objections, some of which had been sustained. From this, we can discern the trial court's consideration of Goble's effectiveness in representing himself if he were made to continue.

As to the other Koehler factors, [footnote omitted] we note that Goble's reason for requesting counsel representation at this late stage in the trial appears to be legitimate, i.e. the difficulty inherent in questioning himself. Further, it is not clear whether the trial court even considered what disruption or delay, if any, could have been reasonably expected if Goble's request would have been granted. The trial court may have believed that because Mr. Voelz was present at only one of twenty or so depositions which Goble conducted, Mr. Voelz was not prepared to take over as counsel for Goble, and that such may have caused a delay. However, our review of the record indicates that any disruption or delay would likely have been minimal. The record reveals that Mr. Voelz informed the trial court that he felt obligated, as standby counsel, to take over if Goble requested. Mr. Voelz further stated that he would not decline Goble's request to take over, so long as Goble made the request to the court. Moreover, the trial court itself noted that Mr. Voelz had been present and very helpful to Mr. Goble throughout the entire trial, making it more likely that Mr. Voelz was familiar with Goble's defense and thus could immediately and adequately step in and take over.

Applying the Koehler factors to the case at bar, we recognize that this is a close case. However, we note that Goble was never advised of the dangers and disadvantages of waiving his right to counsel. . . .

. . . Our analysis of the Koehler factors, in conjunction with the trial court's failure to advise Goble of the dangers and disadvantages of self-representation, leads us to

conclude that the trial court violated Goble's Sixth Amendment right to counsel, and thus, Goble's convictions must be vacated.

. . . .

Goble argues that there was insufficient evidence to support his convictions for perjury because the State failed to prove that he knew the statements he made in the liens were false. . . .

In the lien Goble filed against the school property, Goble stated that he had "purchased" the property with his $20 gold piece, which he asserted was the "best bid" received by the school corporation. [Citation to Brief omitted.] Goble, believing that the gold standard is the law of the land testified that,

> "my belief that by use of the twenty dollar Liberty gold coin standard dollar in that denomination presented with the bid being, was a full payment best bid is absolutely, no doubt in my mind, absolute, for sure the highest bid and the best payment that could ever have been received, ... [Citation to Record omitted.]

From this evidence, a jury could reasonably infer that Goble's belief in the gold standard is so beyond the reality of today's society that Goble knew that he had not "purchased" the school's property with his bid of a $20 gold piece.

In the lien filed against Judge Rush's house, Goble stated that he believed that Judge Rush had acted without authority and that such constituted a tort against him and that Judge Rush was not immune from prosecution. The State asserts that these were false, material statements of fact which Goble knew to be false. We do not agree. . . . We conclude that Goble's statements that Judge Rush "issued an invalid Order by Trespass," that Judge Rush was "acting in administrative, or ministerial capacity as a common outlaw in place of the special judge," and that Judge Rush "in such capacity, . . . ha[d] no immunity from prosecution," are more properly construed as legal conclusions and not factual statements. [Citation to Brief omitted.] Therefore, such statements may not serve as the basis for a perjury conviction

Goble argues that his convictions for filing fraudulent records must be vacated because attempts to create liens on real estate were statutorily exempted from prosecution for this offense. The State agrees.

Here, the charges against Goble for filing fraudulent records are based upon a violation of I.C. § 26-1-9-508(f). However, Indiana Code § 26-1-9-104(j) (Burns Code Ed. Repl. 1999) [footnote omitted] provides that "IC 26-1-9 does not apply . . . to the creation or transfer of an interest in or lien on real estate." There is no dispute that the documents Goble filed with the Whitley County Clerk purported to create common law liens against real estate, i.e. the school's property and Judge Rush's house. . . .

. . . .

MATTINGLY-MAY and NAJAM, JJ., concurred.

CIVIL LAW ISSUES

BEAM v. WAUSAU INS. CO., No. 20S03-0202-CV-111, ___ N.E.2d ___ (Ind. Feb. 12, 2002).
BOEHM, J.

This case addresses the proper setoff against a personal injury award for payments the claimant receives under worker's compensation. We hold that under the underinsured motorist policy involved here, the setoff is against the amount of damages, not against the policy limits, but where the amount recovered is reduced for the claimant's comparative fault, the reduction is by that percentage of duplicated elements of damage, not the gross sum of worker's compensation benefits to which the worker is entitled irrespective of fault.

On August 20, 1993, Steven Beam was driving a semi tractor trailer on Interstate 90 outside Chicago. Beam was severely injured when he swerved the semi off the road to avoid colliding with Amanda Vongsomchith's stalled car in the right driving lane.

As a result of the accident, Beam received payments from various sources. Vongosomchith's liability . . . paid its policy limits of $20,000 to Beam. After deducting this $20,000, Beam's personal automobile insurer . . . paid Beam $80,000 under his underinsured motorist ("UIM") coverage, which had a limit of $100,000. Beam was driving a vehicle owned by his employer, Fairmont Homes, Inc., in the course of his employment. Fairmont was self-insured for worker's compensation benefits up to $350.000. Fairmont paid Beam the entire amount of his medical expenses of $310,206.56 as a worker's compensation benefit. Finally, Fairmont's excess worker's compensation carrier, Wausau Insurance Company, made disability payments for temporary total disability, temporary partial disability, and permanent partial disability to Beam in the amount of &86,945.14.

In addition to the sources listed above, Fairmont had an automobile liability from Wausau that covered Fairmont and the occupants of its vehicles as the "insured," and provided UIM coverage of $1,000,000. Wausau denied UIM coverage to Beam, and Beam brought this suit against Wausau.

Wausau's policy contains the following provisions relevant to its UIM exposure to Beam:

> A. COVERAGE
> We will pay the sums the "insured" is legally entitled to recover as compensatory damages from the owner or an "uninsured motor vehicle" or an "underinsured motor vehicle."
>
> . . .
>
> C. EXCLUSIONS
> This insurance does not apply to: . . .
> 2. The direct or indirect benefit of any insurer or self-insurer under any workers compensation, disability benefits or similar law.
>
> . . .
>
> D. LIMIT OF INSURANCE . . .
> 2. The Limit of Insurance under this coverage shall be reduced by all sums paid or payable by or for anyone who is legally responsible, including all sums paid under the Coverage Form's LIABILITY COVERAGE.
> 3. Any amount payable for damages under this coverage shall be reduced by all sums paid or payable under any workers' compensation, disability benefits or similar law.

Before trial, the parties agreed that the jury would determine only liability and damages, and the propriety of any setoffs for amounts Beam received from other sources would be determined by the court. It was also stipulated that the jury verdict should be reduced by the $20,000 from Vongsomchith's liability insurer and the $80,000 from Beam's UIM policy. The jury allocated fault 55% to Vongsomchith and 45% to Beam, and awarded Beam $701,371 as net damages. The record does not explicitly indicate how the jury arrived at this figure or what it concluded the total damages to be. The trial court awarded setoffs against the jury verdict of $701, 371 for (1) the amount Beam received from Vongsomchith's insurer ($20,000), (2) Beam's UIM coverage ($80,000), (3) the worker's compensation medical benefits from Fairmont ($310,206.56), and (4) the worker's compensation disability payment ($86,945.14). The recovery was thus reduced to $204,219.30

Beam appealed, claiming the trial court erred when it subtracted these amounts from his jury award of $701,371. The Court of Appeals rejected Beam's arguments and affirmed the trial court decision. Beam v. Wausau ins. Co., 743 N.E.2d 1188 (Ind. Ct. App. 2001).

. . . .

We address Beam's first argument to resolve the conflicting Court of Appeals' decisions reaching opposite conclusions as to whether the policy language in this case is ambiguous.

Although some "special rules of construction of insurance contracts have been developed due to the disparity in bargaining power between insurers and insured's, if a contract is clear and unambiguous, the language therein must be given its plain meaning." [Citation omitted.] On the other hand, "'[w]here there is ambiguity, insurance policies are to be construed strictly against the insurer' and the policy language is viewed from the standpoint of the insured." [Citations omitted.] . . .

The limitation under paragraph D.2 in Wausau's UIM coverage expressly reduces its limits by amounts from other sources. Paragraph 3 reduces "any amount payable for damages" by "sums paid or payable under any workers' compensation." Beam contends that the phrase [a]ny amount payable for damages under this coverage" has two interpretations and can either be read to refer to a reduction from the total damages or from the policy limits. Based on this claimed ambiguity, Beam argues that this provision reduces Wausau's policy limit of $1,000,000, not Beam's damage award amount of $701,371, by the amount of his worker's compensation benefits.

In 1992, this Court found similar policy language to be ambiguous and, as a result, construed it in favor of the insured. Tate v. Secura Ins., 587 N.E.2d 665 (Ind. 1992). [Footnote omitted.] In Tate, the total award was greater than the available insurance and the court construed the policy most favorably to the insured. As a result, the "amount payable" to be reduced was held to be the amount of the damages, not the policy limits. [Citation omitted.] That same year, this Court held similar, but distinguishable, policy language to be unambiguous and interpreted the language to refer to policy limits rather than total damages the insured incurred. Am. Econ Ins. Co. v. Motorists Mut. Ins. Co., 605 N.E.2d 162 (Ind. 1992). [Footnote omitted.] Since these holdings, two lines of Court of Appeals' cases involving reduction policy language have evolved, although in many cases the policy language varies and is some instances the courts have found the peculiar language or other language of the policy relevant to the case. One line holds similar language ambiguous . . . . [Footnote omitted.] The other line of cases holds the language unambiguous, but the cases differ on whether the language provides for reductions form the total damages or the policy limit. [Footnote omitted.]

. . . .

Part D of the policy refers to "[a]ny amount payable for damages under this coverage." We think it is clear that the language provides that the reduction will be taken from the amount of damages Beam incurred rather than from the policy limit. the quoted phrase explicitly provides that the reduction will be taken from Beam's *damages*, not the policy limits. The following phrase, "under this coverage," is a general phrase contained in insurance agreements that refers to the scope of the initial insuring agreement, not the dollar amount of the policy limit. Here, the coverage the policy refers to is "sums the 'insured' is legally entitled to recover as compensatory damages from the owner . . .of an 'underinsured motor vehicle.'" Because Beam was 45% at fault, he is legally entitled to $01,371, and any reduction for worker's compensation and disability benefits should come from that amount, irrespective of whether that amount is above or below the policy limits. If that amount is above the limit, this helps the insured, and if it is below the limit, it helps the insurer. We think this is not only a neutral rule, but also consistent with the language of the policy and its purpose to provide indemnity for covered losses subject to policy limits.

. . . .

Beam contends that the trial court erred in subtracting the full amount of worker's compensation from the jury award, which was based on a 55% allocation of fault to the tortfeasor. He bases this contention on two separate statutes. He first contends that the lien reduction statute, Indiana Code section 34-51-2-19, is relevant and has the effect of

reducing the jury verdict of $701,371 by $218,433.43 (55% of the worker's compensation payment) rather than $397,151.70 (the full amount of those benefits). . . . Although Beam concedes that there is no lien involved in this case, th argues that the lien statute needs to be considered in determining the appropriate reduction in coverage.

. . . .

Beam contends that the trial court erred in subtracting the full amount of worker's compensation from the jury award, which was based on a 55% allocation of fault to the tortfeasor. He bases this contention on two separate statutes. He first contends that the lien reductions statute, Indiana Code section 34-51-2-19, is relevant and has the effect of reducing the jury verdict of $701,371 by $218,433.33 (55% of the worker's compensation payment) rather than $397,151.70 (the full amount of those benefits). . . . although Beam concedes that there is no lien involved in this case, he argues that the lien statute needs to be considered in determining the appropriate reduction in coverage.

. . . .

The Court of Appeals held that the lien reduction statute does not apply to this case. We agree. A lien is a "claim which one person holds on another's property as a security for an indebtedness or charge." [Citation omitted.] Subrogation "applies whenever a party, not acting as a volunteer, pays the debt of another that, in good conscience, should have been paid by the one primarily liable." [Citation omitted.] By its terms, the lien reduction statute applies only to those situations where an insurer has already paid monies to an injured party and is subsequently attempting to recover the amount paid. [Citation omitted.] Here, there is no claim by an insurer against an insured. Rather, this claim is a claim being made by the insured, Beam, against the insurer, Wausau.

. . . .

Because we modify the amount of damages, but do not reverse the judgment for the plaintiff, post-judgment interest runs from the date of the original verdict on the modified amount. Indiana Code section 24-4.6-101 calls for post-judgment interest from the date of the "verdict" in a jury trail or the findings in a bench trial. [Citations omitted.] . . .

This Court has not explicitly addressed the question of whether post-judgment interest on a modified award runs on the amount after modification by the reviewing court or on the original amount. [Citation omitted.] . . .

. . . .

[T]he prevalent view in other jurisdictions is that "where a money judgment has been modified on appeal and the only action necessary in the trial court is compliance with the mandate of the appellate court, interest on the judgment as modified runs from the date of the original judgment." [Citation omitted.] [Footnote omitted.] We think this is the more sensible view. If a judgment is increased, this rule compensates plaintiffs for the loss of money that has been determined to have rightfully belonged to them throughout the time of the pending appeal. It also reduces the defendant's incentive to continue to resist a plainly meritorious appeal merely to obtain the lower interest cost produced by the initial award. Similarly, if a judgment is reduced on appeal, interest should run only on the amount to which the plaintiff is entitled, not on a greater sum. And despite some courts' concern that a party may be surprised by a modification, the fact of a pending appeal gives the parties adequate notice that they may be liable for interest on a modified amount if the appellant prevails. The modified amount is the amount that the trial court should have entered on the original date, and post-judgment interest should run on the modified amount from the date of the original verdict.

. . . .

SHEPARD, C. J., and DICKSON, RUCKER, and SULLIVAN, JJ., concurred.

GALLANT INS. CO. v. OSWALT, No. 43A04-0104-CV-148, ___ N.E.2d ___ (Ind. Ct. App. Feb. 12, 2002).

BARNES, J.

Jeffrey Oswalt sued Donald Chadwick on December 13, 1996, claiming personal injuries resulting from an automobile accident that had occurred on June 22, 1996. On April 7, 1997, Gallant notified Chadwick in writing that because he had failed to comply with the terms and conditions of his insurance policy, it would be proceeding in his defense under a reservation of rights. Due to difficulty in communicating with Chadwick, Gallant performed a skip-trace on August 20, 1998, to locate him. When the skip-trace revealed a new address, Gallant advised him a second time, on October 8, 1998, that it was defending Oswalt's claim against him under a reservation of rights due to his failure to cooperate in the defense. On October 28, 1998, Chadwick assisted the counsel Gallant had retained, Kenneth Wilk, in completing Oswalt's "First Set of Interrogatories."

Despite counsel's admonishments to Chadwick that it was necessary to be present for trial, he failed to appear. On October 13, 1999, at the conclusion of a two-day jury trial, Oswalt obtained a judgment of approximately $56,000 against Chadwick. On January 26, 2000, Oswalt initiated proceedings supplemental to execution, naming Gallant Insurance Company as garnishee-defendant. In its answer filed February 18, 2000, Gallant asserted Chadwick had "failed to appear for trial or otherwise cooperate" with Gallant in his defense, in so doing had breached the insurance policy issued him by Gallant, and thus was not entitled to coverage. [Citation to Brief omitted.]

Gallant next filed a motion for declaratory judgment on March 15, 2000, seeking the trial court's determination that it did not owe Chadwick coverage under the policy due to his failure to cooperate in defending Oswalt's suit. On January 10, 2001, Oswalt moved for summary judgment, filing a memorandum in support thereof and designating inter alia the affidavits of Chadwick and Oswalt's counsel, Michael Valentine. In relevant part, Chadwick averred that: he was insured by Gallant at the time of the accident; he had been "accessible by telephone" and had participated in "three or four phone discussions" with Kenneth Wilk, the first attorney Gallant retained to represent him; and he had "two conversations" with the attorney subsequently retained by Gallant to replace Wilk. [Citation to Brief omitted.] He averred that he told the second attorney that he "understood the importance of attendance at the trial and . . . wanted to be there," and had asked him "to try to have the date of the trial moved" so he could attend. [Citation to Brief omitted.] However, his affidavit also states that he had been informed that the trial date could not be changed.

The thrust of Valentine's affidavit was that Chadwick's counsel "never mentioned the defense of 'failure to cooperate'" to him "before, during or after the trial in this matter." [Citation to Brief omitted.] He also averred that Chadwick's counsel had not tried to change the trial date by informing him or the court of Chadwick's inability to attend, and that had he "known that [Chadwick's counsel] would attempt to assert the 'failure to cooperate' defense after the trial," he "would have attempted to use the Court's subpoena power to secure Mr. Chadwick's attendance at the trial in an effort to conserve judicial resources by avoiding this post-trial litigation." [Citation to Brief omitted.]

The trial court granted Oswalt's summary judgment motion on March 7, 2001, finding in part "[t]hat neither at the trial of this action, nor prior thereto, was any claim made or presented to the Court that [Chadwick] failed to cooperate or in any way breached the cooperation clause of the underlying policy in this case." [Citation to Brief omitted.] Gallant appeals.

. . . .

[Gallant Ins. Co. v.] Wilkerson [720 N.E.2d 1223 (Ind. Ct. App. 1999)] also stated the following proposition:

> When an insurer questions whether an injured party's claim falls within the scope of policy coverage or raises a defense that its insured has breached a policy condition, the insurer essentially has two options: (1) file a declaratory judgment action for a judicial determination of its obligations under the policy; or (2) hire independent counsel and defend its insured under a reservation of rights.

[Citation omitted.] . . .

> . . . In proceedings supplemental to recover from a liability insurer, the judgment creditor bears the burden of showing a judgment, the insurance policy, and facial coverage under the policy. [Citation omitted.] In [[Illinois Founders Ins. Co. v.] Horace Mann [738 N.E.2d 705 (Ind. Ct. App. 2000)], we determined that a garnishee-defendant insurance company could not launch a collateral attack on the plaintiff's judgment by way of asserting the insured's non-cooperation because it had not so claimed at trial. [Citation omitted.] We cited Wilkerson, where we had noted the general rule that
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> > an automobile liability insurer which learns before the trial of an action against its insured that the insured has breached the cooperation clause of the policy, and nevertheless defends him at trial, thereby waives or is estopped to assert the insured's noncooperation in a subsequent action to recover on the policy. This rule has been applied in a number of cases in which the insured failed to appear at the trial of the original action brought against him or her, and where the insurer conducted the defense of the insured in his or her absence.
>
> [Citation omitted.] . . .
>
> Horace Mann is also factually distinguishable from this case. In that case, we could "discern no evidence from the Record, nor does [insurer] provide us with any, to support even an inference that it took affirmative steps necessary to locate [the insured] and procure his attendance [at trial]." To the contrary, here, the record on appeal demonstrates that both counsel and Gallant attempted to locate Chadwick and to procure his attendance at trial. As we noted in Horace Mann, "when an insurer is prejudiced by the insured's noncompliance with the policy's provisions, the insurer is relieved of its liability under the policy." 738 N.E.2d at 707. Gallant was arguably prejudiced by Chadwick's noncompliance and failure to cooperate; whether the prejudice is sufficient to foreclose coverage under the terms of the insurance contract between Gallant and Chadwick can and should be determined by the declaratory judgment action, and is at least a question of fact precluding summary judgment in Oswalt's favor at this juncture. Thus, we hold that because Gallant proceeded under a reservation of rights, it was entitled to raise the defense of Chadwick's non-cooperation, and that as such, the trial court erred in granting summary judgment to Oswalt.
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> [T]he dissent questions whether Gallant proceeded under a valid reservation of rights and evaluates Gallant's attempts at such a reservation, finding them inadequate. However, we believe it is inconsistent to say that insurers must proceed under a reservation of rights while also holding that a letter that says, "this notice is given to you to reserve the rights of the Company" does not effect that end. [Citation to Brief omitted.]
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> . . . .
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> We take no issue with the notion, advanced by the dissent, that prejudice resulting from material non-cooperation must be shown by the insurer to avoid coverage. However, we submit that the dissent strays from the mark in stating that such prejudice must be irrefutably proven before the insurer can assert or attempt to assert a reservation of rights. Certainly, the resolution of a subsequent declaratory judgment action turns on whether the insurer can demonstrate prejudice resulting from material non-cooperation. But because the duty to defend is broader than the duty to indemnify, the insurer must first reserve the right to deny coverage later, via, for example, a declaratory judgment action, while at the same time it appears and defends the insured. Otherwise, it risks a bad-faith action for breach of the duty to defend. Such is the purpose of a reservation of rights: to allow the insurer to fulfill the broad duty to defend while at the same time investigating and pursuing the narrower issue of whether indemnification will result. . . . We do have to decide

whether there is a question of fact about the validity of the reservation, and decline to hold that here, the reservation was not valid because the insurer had indicia that the insured might not cooperate well before he failed to appear for trial, and took all the steps it knew to take in order to effect a valid reservation of rights. . . .

Additionally, in Horace Mann we acknowledged that "a liability insurer may stay proceedings supplemental while pursuing a separate declaratory action to determine the insurer's liability under the policy." 738 N.E.2d at 708 (citing Wilkerson, 720 N.E.2d at 1227). Here, the proceedings supplemental were initiated on January 26, 2000. In its answer filed February 18, 2000, Gallant availed itself of its first true opportunity to claim Chadwick's non-cooperation (i.e., his failure to appear at the trial in late 1999) as a defense to liability. [Footnote omitted.] Then, almost ten months before Oswalt filed the summary judgment action from which Gallant now appeals, Gallant initiated its declaratory judgment action, on March 15, 2000. It would have been appropriate for the trial court to stay the proceedings supplemental during the pendency of the declaratory judgment action.

We further wish to address a practical aspect we did not speak to in Horace Mann, Wilkerson, Johnson, or Miller: namely, the ethical prohibition upon insurance counsel to "volunteer" the fact of a client's non-cooperation to the trial court or to the plaintiff. . . . It seems to us inappropriate to place the onus of disclosure of the insured's putative non-cooperation upon counsel obtained by the insurance company to represent the insured. Such a rule would likely run afoul of Professional Conduct Rule 1.6, which provides in relevant part, "(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . . ."

. . . If a plaintiff such as Oswalt wishes to inquire during discovery as to whether an insured's non-cooperation has been or threatens to become an issue as litigation continues – and/or to inquire whether the insurance carrier is proceeding under a reservation of rights – it may do so. At that point, the insured's counsel – who may or may not be retained by the insurance company, but in either case may or may not be aware of the extent to which the insured is "cooperating" under the terms of the insurance contract – can inquire of the insurance company and give the appropriate response. The ethical difference is between volunteering the information and responding truthfully when asked. We find nothing in the record on appeal to indicate here that Oswalt asked the question. We therefore depart from Horace Mann to the extent that it stands for the proposition that it is incumbent upon an insured's defense counsel to volunteer information potentially adverse to his client. . . .

The dissent offers that "the injured plaintiff is entitled to be put on notice that collection of any judgment which might be rendered in his favor has been jeopardized . . . . At a minimum, the injured plaintiff should be apprised if and when the insurer notifies the insured that the defense is proceeding under a reservation of rights." Slip op. at ___. We agree that such a scheme would alleviate or minimize the problem of going through trial and obtaining judgment only to be faced later with the inability to collect that judgment because of a coverage dispute between the insurer and the insured. But the requirement of such a disclosure is not currently the law in Indiana.

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MATTINGLY-MAY, J., concurred.

SULLIVAN, J., filed a separate written opinion in which he dissented, in part, as follows:

It is my view that the only breach of the terms and conditions of the policy, even arguably sufficient to warrant a denial of coverage, was Chadwick's failure to appear at trial and assist in his defense. [Footnote omitted.] . . . I believe that the majority misreads the underlying rationale for this dissent. It is not that an insurer may not assert a reservation of rights without first proving prejudice. Rather, it is that there must have been

an instance or instances of meaningful non-cooperation before the reservation of rights may be effectively asserted. . . .

Although there was some justification, at least before October 28, 1998, for Gallant's concern that Chadwick might not fully cooperate, nothing Chadwick did or did not do prejudiced Gallant's ability or duty to defend; nor was there anything done which caused Gallant to advise Chadwick that coverage was being denied. To the contrary, all the communication to Chadwick was phrased in terms of "if" you do not cooperate, certain consequences might occur.

The phrasing of Gallant's communications to Chadwick and the conduct of defendant's counsel prior to the date of trial unmistakably indicate that, despite knowledge of arguable but technical non-cooperation on the part of Chadwick, Gallant was "'continuing to act for the insured before the trial. . . .'" [Citation omitted.] . . .

Accordingly, I question whether the majority is correct in its conclusion that here, . . . Gallant proceeded under a valid reservation of rights. . . .

. . . .

In the case before us, neither of the parties nor the trial court anticipated Chadwick's failure to appear at trial. In this set of circumstances, I would submit that there was no duty for insurance counsel to advise Oswalt of the then obvious non-cooperation, nor of Oswalt to make inquiry of Gallant as to the same obvious fact.

To the extent that Horace Mann and Wilkerson require the insurance company to assert the non-cooperation defense at the first reasonable opportunity, I would apply those decisions to the case before us. Having waited from October 12, 1999, the first day of trial, until February 18, 2000, to present the issue, Gallant should now be estopped to assert that defense.

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